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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-312

ROMAN GRIBBS, Mayor of the City of Detroit, et al., Petitioners,

v.

AMERICAN MINI THEATRES, INC., a Michigan corporation, and PUSSY CAT THEATRES OF MICHIGAN, INC., a Michigan corporation, Respondents.

— — —

ROMAN GRIBBS, Mayor of the City of Detroit, et al., Petitioners,

v.

NORTOWN THEATRE, INC., Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONERS

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TABLE OF CONTENTS

	Page
Index of Authorities	i
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes and Ordinances Involved	2
Statement of the Case	4
Summary of the Argument	7
Argument	14
Conclusion	62

TABLE OF AUTHORITIES

Cases

Associated Press v United States, 326 US 1, 89 L Ed 2013; 65 S Ct 1416, reh den, 326 US 802, 803, 90 L Ed 489, 66 S Ct 6, 7 (1944) 24

Berman v Parker, 348 US 26 (1945) 21, 22

Brazee v Michigan, 241 US 340; 16 L Ed 1034; 36 S Ct 561 (1916) 30

Building Commission of Detroit v Kunin, 181 Mich 604 (1914) 30

Burstyn v Wilson, 343 US 495; 96 L Ed 1098; 72 S Ct 777 (1951) 39

Cady v City of Detroit, 289 Mich 499 (1939) ... 31,32,33, 40, 41

Page

California v LaRue, 93 S Ct 390; 409 US 109; 34 L Ed 2d 342 (1972) 14

Cameron v Johnson, 390 US 611; 20 L Ed 2d 182; 88 S Ct 1335 (1968) 46, 47, 49, 50

Carter v International Detrola Corp., 328 Mich 367 (1950) 49

Chaplinsky v New Hampshire, 315 US 568; 86 L Ed 1031 (1942) 24

City of Grand Rapids v Braudy, 105 Mich 607 (1895) 30

Cohen v California, 403 US 15; 29 L Ed 2d 284; 91 S Ct 1780 (1971) 35

Cox v Louisiana, 379 US 559; 85 S Ct 476; 13 L Ed 2d 487 (1965) 9, 24, 37, 38, 47, 48, 52, 53

Cox v New Hampshire, 312 US 569; 85 L Ed 1049; 61 S Ct 762; 133 ALR 1396 (1941) 9, 52

Crownover v Musick, 509 P 2d 497, cert den, 39 L Ed 2d 489 (Calif. 1974) 14

Cusack Co v Chicago, 242 US 526 (1917)..... 11

Eastwood Park Amusement Co. v Mayor of East Detroit, 325 Mich 616 (1925) 30

Euclid v Ambler Co., 272 US 365 (1926)..... 7

Feiner v New York, 340 U. S. 315, 95 L Ed 295 (1951) 24

Freedman v Maryland, 380 US 51; 13 L Ed 2d 649; 77 S Ct 734 (1965) 12, 54, 55, 58

Page

Ginsberg v State of New York, 390 US 676; 20 L Ed 2d 195; 88 S Ct 1274, reh den, 391 US 971; 20 L Ed 2d 887; 88 S Ct 2029 (1968)..... 25

Glackman v City of Miami Beach, 51 S 2d 294 (Fla, 1951) 31

Grayned v City of Rockford, 408 US 104; 33 L Ed 2d 222; 92 S Ct 2294 (1972) 9, 24, 52

Hughes v City of Detroit, 217 Mich 567 (1922).. 30

Interstate Circuit, Inc. v Dallas, 390 US 676; 20 L Ed 2d 255; 88 S Ct 12, 98 (1968)..... 25

Kamerman v Leroy, 133 Conn 232; 50 A 2d 175 (1946) 31

Kingsley Books v Brown, 354 US 436; 1 L Ed 2d 1469; 77 S Ct 1325 (1957) 55

Kovacs v Cooper, 336 US 77; 93 L Ed 513; 69 S Ct 448; 10 ALR 2d 608 (1949) 24

Lanzetta v New Jersey, 306 US 451; 83 L Ed 888; 59 S Ct 618 (1938) 48

Lehman v Shaker Heights, 418 US 298 (1974) 36

Melconian v City of Grand Rapids, 218 Mich 397 (1922) 30

McAlpine v Reese, 309 F Supp 136 (DC 6th Cir 1970) 24, 25

Miller v California, 413 US 15; 37 L Ed 2d 419 (1973) 22, 23

Mutchell v City of Kalamazoo, 323 Mich 215 (1948) 30

	Page
Near v Minnesota, 283 US 697; 75 L Ed 1357 (1931)	33
O'Connor et al v Board of Zoning Appeals of Town of Stratford, 140 Conn 65; 98 Atl. 2d 515 (1953)	30, 31
106 Forsythe Corp v Bishop, S. C. #73-1176; cert den June 23, 1975; 43 LW 3674	22
People v Armstrong, 73 Mich 288 (1889)	30
People v Bloss, 27 Mich App 687; overruled at 388 Mich 409 (1972); vacated and remanded, 413 US 909; 37 L Ed 2d 102 (1973)	19, 22
People v Harley, 230 Mich 676 (1925)	30
People v Pennock, 294 Mich 578 (1940)	30
Police Department of City of Chicago v Mosely, 408 US 92; 33 L Ed 2d 212 (1972)	9, 50
Prawdzik v City of Grand Rapids, 313 Mich 376 (1946)	30
Redrup v New York, 386 US 767; 875 S Ct 1414; 18 L Ed 2d 515 (1967)	19
Roth v United States, 354 US 476; 1 L Ed 2d 1498; 77 S Ct 1304 (1957)	23
Rydd v State Board of Health, 451 P 2d 239 (Kansas 1969)	57
Schneider v Irvington, 308 US 146; 84 L Ed 2d 155 (1939)	33
Shelton v Tucker, 364 US 479; 5 L Ed 2d 231; 81 S Ct 247 (1960)	53

	Page
Shuttlesworth v Birmingham, 394 US 147; 22 L Ed 2d 162 (1969)	24
Soof v City of Highland Park, 30 Mich App 400 (1971)	39
Tally v Detroit, 54 Mich App 328; on rehearing 58 Mich App 261 (1975)	13, 39, 57
Times Film Corp. v Chicago, 365 US 43; 5 L Ed 2d 403; 81 S Ct 391, reh den, 365 US 856; 5 L Ed 2d 820; 81 S Ct 798 (1961)	39, 40, 59, 60, 61
United States v Harriss, 347 US 612; 98 L Ed 989; 74 S Ct 808 (1953)	24, 46
United States v O'Brien, 391 US 367; 20 L Ed 2d 672 (1968)	7, 9, 26
Village of Belle Terre v Boraas, 416 US 1 (1974)	21, 22, 27
Williams v Rhodes, 393 US 23; 21 L Ed 2d 24; 89 S Ct 5 (1968)	53

Constitutional, Statutory and Ordinance Provisions

28 USC 1254 (1)	1
28 USC 1331	6
28 USC 1343 (3)	6
42 USC 1983	6
1963 Michigan Constitution, Article VI, Sec. 28.	57
Zoning Enabling Act of State of Michigan, (1921 PA 207)	15, 16, 29

Detroit City Charter (1918)

Page

Title III, Chapter 1, Section 12 29

Official Zoning Ordinance of City of Detroit

Sec. 66.000 ..... 4, 16

66.0100 17

66.0101 ..... 5, 17

66.0103 .....5, 10, 53

32.0007 .....5, 44, 45

Detroit Municipal Code

Sec. 5-2-1.2 ..... 37, 44

5-2-3 39

Law Review Articles

Void-for Vagueness Doctrine in the Sup. Ct., 109 U. Pa. L Rev 67 (1960) 48

Miscellaneous

Words and Phrases, Vol. 40, pp. 757-764, "Substantial" 48, 49

1963 Mich. Gen Court Rules 710, 711 57

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OPINIONS BELOW

The opinion of the Court of Appeals (App A, pp 15-39) is not reported. The opinion of the District Court (App. D, pp 43-60) is reported at 373 F Supp 363.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit (App. B, pp. 40-41) was entered on June 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a compelling state interest exists which requires regulation of businesses which offer for sale or exhibition "adult" material.

2. Whether the zoning and licensing regulations affecting "adult" businesses are based upon a reasonable classification, and bear a reasonable relation to the legitimate governmental purpose sought to be achieved.

3. Whether the provision of the new zoning and licensing laws affecting "adult" businesses are clearly defined with narrow specificity and are directed only against those businesses which, in the interest of the general welfare, must be regulated.

4. Whether the provisions of the new zoning and licensings laws affecting "adult" businesses provide procedural due process which do not operate as a prior restraint on the exercise of Respondents' rights under the First and Fourteenth Amendments to the U. S. Constitution.

STATUTES AND ORDINANCES INVOLVED

The legislative body of the City of Detroit is authorized to divide the City into zoning districts, and to regulate and restrict the location of trades therein, by virtue of the authority granted by the Zoning Enabling Act, 1921 PA 207 (MCLA 125.581) which provides:

> "The legislative body of cities and villages may regulate and restrict the location of trades and industries and the location of buildings designed for

> specified uses and for such purposes divide any city or village into districts of such number, shape and area as may be deemed best suited to carry out the provisions of this section. For each of such districts regulations may be imposed designating the uses for which buildings or structures shall or shall not be erected or altered, and designating the trades and industries that shall be permitted or excluded or subjected to special regulations. Such *regulations shall be made* in accordance with a plan designed to lessen congestion on the public streeets, to promote public health, safety and general welfare, and shall made *with reasonable consideration,* among other things, *to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the general trend and character of building and population development.*" (Emphasis added.)

By virtue of that authority, the Detroit City Council enacted several amendments to its Official Zoning Ordinance, which defined certain "adult" businesses, and designnated them as "regulated uses". These amendments were incorporated into Ordinance 742-G, (App. G, pp. 65-79). Section 66.0100 of the Official Zoning Ordinance was not amended, but is inserted here for clarification in reading the amendments incorporated in 742-G. Section 66.0100 provides:

> "Application to establish any of the above regulated uses shall be made to the City Plan Commission, who shall not approve such request if there is already in existence two or more such regulated uses within 1,000 feet of the boundaries of the site of the proposed regulated use, excepting as provided for in Sec. 66.0101."

By Ordinance 743-G, the Detroit City Council amended Chapter 5, Article 2 of the Municipal Code to include within the provision affecting public entertainment generally, coin-operated motion picture devices, adult motion picture theatres, adult mini motion picture theatres, drive-in theatres and concert halls. (The pertinent licensing provisions of Ordinance 743-G are printed in the Appendix at pp. 80-84).

STATEMENT OF THE CASE

In 1969, there were located within the City of Detroit, two "adult" bookstores, two "adult" theatres, and two insignificant number of "topless" cabarets. By mid-1972 the number of "adu!t" theatres had increased to eighteen, "adult" bookstores had increased to twenty-one, and "topless" cabarets numbered approximately seventy. Reports submitted to the Detroit City Council by the Police Department indicated that many of these "adult" businesses were clustering on main streets of the City (and Highland Park, a city within the City of Detroit), which were immediately adjacent to residential neighborhoods. Acting upon complaints of such neigborhood residents, the City Council enacted Ordinance 742-G, (App G, p. 65), amending the Official Zoning Ordinance by including "adult" theatres and bookstores, and Class "D" (topless) cabarets in the category of "regulated uses." "Regulated uses" were those uses determined from experience to have a deleterious effect on a neigborhood, and included taxi dance halls, bars, motels, pawnshops, etc. (Sec. 66.0000). Such uses were restricted in their location, i.e., no more than two "regulated uses" were to be permitted within 1,000 feet of each other. This prohibition could be waived by the City Plan Commission upon a showing that the proposed location of the

"regulated use" would not be injurious to the surrounding area. (Sec. 66.0101).

In addition, Sec. 66.0103 of the Ordinance prohibited the location of an "adult" business within five hundred feet of a residential unit unless the prohibition was waived by the consent of fifty-one percent of the persons living or doing business within five hundred feet of the proposed location.[1]

Ordinance 743-G (App. H, p. 80) amended the Municipal Code to include "adult" theatres under Chapter 5, Article 2, entitled "Public Entertainment Generally" and required that they be licensed by the City.

Subsequent to the enactment of the above described ordinances on November 2, 1972, the Respondent Nortown Theatre, Inc. began exhibiting films which were "adult", as defined in Sec. 32.0007 (App. G, at pp. 65-67) in an established theatre which was within 1,000 feet of several other regulated uses and within five hundred feet of a residential area. The Respondents American Mini Theatres, Inc. and Pussy Cat Theatres, Inc., converted a corner gas station to a mini theatre and offered similar "adult" fare for exhibition. The newly renovated theatre was within 1,000 feet of two other regulated uses and within five hundred feet of a residential area. The Respondents were notified by the Petitioners of the City's intention to enjoin their

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[1] The District Court ruled that this provision was unconstitutional as it was more restrictive than necessary to achieve the City's legitimate governmental purpose. The Court stated that the ordinance, as written, protected a *single* residential unit, when the City continually asserted its purpose in enacting the ordinance was the protection of *neighborhoods*. In order to correct the "defect" noted by the District Court, the City amended Sec. 66.0103 to prohibit the location of "adult" businesses within five hundred feet of a "residentially zoned district." (See Ordinance 891-G, App I, pp 84-92.)

operation under the State Zoning Enabling Act and the City zoning ordinances.

In the spring of 1973, following such notification, the Respondents claimed their constitutional rights under the First, Fifth, and Fourteenth Amendments were threatened by the proposed action of the various City officials, and sought declaratory and injunctive relief in the Federal District Court, Eastern District of Michigan, under 42 USC 1983. The jurisdiction of the Court was invoked under 28 USC 1331 and 28 USC 1343(3).

The District Court consolidated the cases for argument and, on March 22, 1974, issued a joint opinion which recognized the City's legitimate governmental purpose, and upheld the validity of the challenged ordinances with the exception noted in Footnote 1 above. (App. D, pp. 43-60). Judgment was entered in the *Nortown* case on April 25, 1974 (App. E. at p. 64) and in the *American Mini Theatres* case on May 20, 1974 (App. F, p. 63). Respondents appealed the decision to the Sixth Circuit Court of Appeals. On June 16, 1975, the Appellate Court, in a two to one decision, ruled that the ordinances were unconstitutional as they related to "adult" material, presumably protected by the First Amendment, in a different manner than other protected material, solely on the basis of content. (App. A, pp. 15-39). Judgment was entered the same day. (App. B, p. 40).

On July 18, 1975, a Stay of Mandate was issued by the Hons. Edwards, Celebrezze and Lively, the panel which decided the case in the Court of Appeals. (App. C, p. 42).

A Petition for Certiorari was filed with the United States Supreme Court on August 28, 1975, and Certiorari was granted on October 20, 1975.

SUMMARY OF ARGUMENT

1. A COMPELLING STATE INTEREST EXISTS WHICH REQUIRES REGULATION OF BUSINESSES WHICH OFFER FOR SALE OR EXHIBITION "ADULT" MATERIAL.

The right of the City of Detroit to reasonably regulate and restrict the location of certain uses, whether business, residential or industrial, is clear. *Euclid v. Ambler Co.*, 272 US 365 (1926). When those regulations affect businesses dealing in materials presumably protected by the First Amendment, the regulations must be justified. In *United States v. O'Brien*, 391 US 367 (1968), this Court held that when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. The Court stated:

> "We think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Applying those standards to the instant case, the power to license and zone businesses and prohibit their location in certain areas is clearly within the constitutional power of the City. The governmental interest, i.e., the preservation and stabilization of neighborhoods in the City of Detroit, is unrelated to the suppression of free expression. First Amendment Rights are indirectly affected, but only

in the sense that they cannot be freely exercised in specific locations.

The challenged ordinances were enacted in response to complaints from residents and businessmen that the influx of "adult" businesses in the City of Detroit was adversely affecting the surrounding business and residential districts, decreasing property values, driving away residents and businessmen, causing increase in crime, particularly prostitution, causing neighborhood decline and the resulting lack of neighborhood pride, and generally detracting from the "quality of life" necessary to maintain a viable neighborhood. Both the trial court and the Court of Appeals recognized that the City of Detroit had demonstrated a substantial governmental interest in protecting and maintaining the character of residential neighborhoods.

It is the City's position that a compelling state interest exists which supports its zoning and licensing regulations designed to prevent "clustering" of adult businesses, and to insure the continued viability and stability of the residential neighborhoods.

2. THE ZONING AND LICENSING REGULATIONS AFFECTING "ADULT" BUSINESSES ARE BASED UPON A REASONABLE CLASSIFICATION AND BEAR A REASONABLE RELATION TO THE LEGITIMATE GOVERNMENTAL PURPOSE SOUGHT TO BE ACHIEVED.

Although the majority opinion of the Court of Appeals recognized that the City of Detroit had demonstrated a compelling interest in preserving its neighborhoods, the majority invalidated the zoning and licensing regulations affecting "adult" businesses ruling that the classification of businesses, on the basis of the contents of the material disseminated therein, is an impermissible classification

under the First Amendment. *Police Department of Chicago v. Moseley*, 408 US 1992 (1972). The majority of the Court failed to recognize that the classification of "adult" and "non-adult" businesses was necessarily defined in terms of the material disseminated therein, in order to distinguish those businesses causing deleterious effects upon the surrounding neighborhood, from similar businesses offering "non-adult" material, which did not cause such adverse effects. The ordinances are not directed toward control of the content of the material, but rather to the place and manner in which the material may be disseminated. This type of regulation as to manner and location, has been consistently upheld by this Court. *Grayned v. City of Rockford*, 408 US 104 (1972); *Cox v. New Hampshire*, 312 US 569 (1941); *Cox v. Louisiana*, 379 US 559 (1965).

The zoning regulations were narrowly drawn to accomplish two legitimate governmental purposes:

1. To avoid clustering of adult businesses and reasonably restrict the number of regulated uses which may locate in any business district serving a neighborhood;
2. To insure the continued support and commitment to the neighborhood of those persons presently residing and doing business therein.

The District Court determined that the prohibition against the establishment of more than two "regulated uses" within 1,000 feet of each other met the requirements of the *O'Brien* test, but that the prohibition against the establishment of an "adult" business within 500 feet of a "residential unit" was more restrictive than necessary to achieve the City's legitimate governmental purpose, i.e., preservation of a neighborhood. The Court stated that the ordinance, as written, protected a *single* residential

unit, when the City continually asserted its purpose in enacting the ordinance was the protection of *neighborhoods*. The City did not appeal this ruling, but attempted to correct the "defect" noted by the Disriet Court, and amended Sec. 66.0103 of Ordinance 742-G (App G, p 65) to prohibit the location of "adult" businesses within 500 feet of a "residentially zoned district." (Ordinance 891-G, App I, pp. 84-92.)

The City contends that Ordinance 742-G (as amended by Ordinance 891-G), and Ordinance 743-G were based upon a necessary, reasonable classification, and were limited in scope to accomplish only those legitimate governmental objectives which were deemed necessary to protect the public welfare.

3. THE PROVISIONS OF THE NEW ZONING AND LICENSING REGULATIONS AFFECTING "ADULT" BUSINESSES ARE CLEARLY DEFINED WITH NARROW SPECFICITY AND ARE DIRECTED ONLY TOWARD THOSE BUSINESSES WHICH, IN THE INTERESTS OF THE GENERAL WELFARE, MUST BE REGULATED.

The City of Detroit has not imposed a total prohibition on "adult" establishments, or the materials disseminated therein. The ordinances prohibit the establishment of "adult" businesses in certain locations in the city, i.e., within 1,000 feet of two other regulated uses; or within 500 feet of a residentially zoned area. The former prohibition may be waived by the City Plan Commission upon making a showing that the establishment of the "adult" business will not adversely affect the neighborhood. The latter prohibition may be waived by obtaining the consent of 51 percent of the persons living or doing business within a 500-foot radius of the proposed location. These regulations were written with the sole purpose in mind of preserving the stability of neigborhoods, and encouraging their continued growth and development. It is the City's position that both regulations are necessary in order to achieve its legitimate governmental purpose. Even if the City avoids "clustering" of regulated uses, i.e., more than two regulated uses within 1,000 feet of each other, the City is still confronted with the possibility that two regulated uses will locate every 1,000 feet, which in effect permits two regulated uses per city block. The most effective way to insure the commitment of the residents and businessmen in the neighborhood, is to prohibit deleterious businesses adjacent to residential areas, and assure the residents and businessmen that such deleterious businesses will be permitted only if a majority of them consent. *Thomas Cusack Co* v *Chicago*, 242 US 526 (1917).

The distinction between the treatment of "adult" businesses and "non-adult" businesses is justifiable because of the difference in impact upon the surrounding neighborhood caused by the two types of businesses. There has been no showing that "non-adult" businesses dealing in motion pictures, stage performances and press materials cause the same delererious effects which are brought about by the establishment of "adult" businesses. The suggestion by the majority of the Court of Appeals that Detroit could legally accomplish its goals by requiring all bookstores and theatres to locate in enclaves within the city, or by restricting their hours of operation, would not solve the problems of decreased property values, increase in crimes, and blight and decay of the surrounding neighborhood. The Times Square District in New York City, beginning at 42nd Street several years ago, and now reaching into the high 50's, should be a sufficient lesson to city planners that the deleterious effects of "adult" businesses cannot be contained.

The city of Detroit should not be required to suffer similar outgrowths of its clusters of adult businesses, and the resulting deterioration to its surrounding neighborhoods, before taking affirmative action to stop the blight. Creating new "clusters" is not the solution.

Finally, the similar treatment of all theatres and bookstores suggested by the majority of the Court of Appeals would, undoubtedly, result in a claim of overbreadth by the "non-adult" businesses who would be subjected to restrictive regulations without any showing of compelling state interest in their regulation.

4. THE PROVISIONS OF THE NEW ZONING AND LICENSING LAWS AFFECTING "ADULT" BUSINESSES PROVIDE PROCEDURAL DUE PROCESS AND DO NOT OPERATE AS A PRIOR RESTRAINT ON THE EXERCISE OF RESPONDENTS' RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Respondents have contended that the zoning and licensing regulations of "adult" businesses are, in effect, a precensorship system which fail to meet the criteria enunciated in *Freedman* v *Maryland,* 380 US 51 (1965), thereby denying to them the procedural due process required by the Fourteenth Amendment. That case, and others cited by respondents, prohibit any regulation which suppresses material presumably protected by the First Amendment, prior to an adversary hearing, which must be provided within a reasonable time. That is not the situation in the case at bar. Ordinances 742-G and 743-G provide specific guidelines to determine whether a license should be issued for the operation of an adult motion picture theatre. The zoning regulations are equally specific. At no time is the material disseminated from the "adult" business subject

to censorship. If the applicant complies with the narrowly drawn licensing and zoning regulations, he is entitled to begin operation of his business, in the same manner as any other applicant who seeks to operate a business within the city of Detroit. The respondents herein readily admitted that they refused to admit minors to their theatres. In doing so, they have themselves recognized that the material offered is of an "adult" nature. The licensing regulations pertaining to the issuance of an "adult" theater license, aside from recognizing the distinction between "adult" and "non-adult" are the same. If the applicant has violated city or state laws "regulating, controlling or in any way relating to the construction, use or operation of any of the establishments included in this article which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby," he may be denied a license. This is a reasonable licensing provision applied equally to all applicants seeking to operate a public entertainment within the city of Detroit. The provision was upheld against constitutional challenges in *Tally* v *City of Detroit,* 54 Mich App 328; on rehearing, 58 Mich App 261 (1975).

As the zoning and licensing regulations relate to the location and operation of the business, not to the content of the material disseminated, and do not suppress or prohibit the dissemination of any kind of material in such establishments, there is no prior restraint on First Amendment rights by reason of the enforcement of Ordinances 742-G and 743-G.

ARGUMENT

I.

A COMPELLING STATE INTEREST EXISTS WHICH REQUIRES REGULATION OF BUSINESSES WHICH OFFER FOR SALE OR EXHIBITION "ADULT" MATERIAL.

In the matter before the Court, the respondents contend that as exhibitors of motion pictures they are protected by the First and Fourteenth Amendments to the United States Constitution and, therefore, the recent amendments to the ordinances of the City of Detroit regulating disseminators of "adult" material by 1) requiring licenses for adult motion picture theatres, and 2) prohibiting the location of adult theatres, adult bookstores, and "topless" cabarets[2] within 1,000 feet of two other "regulated uses" without a waiver from the City Plan Commission, or within 500 feet of a residential unit[3] without a petition signed by 51% of neighboring residents and merchants consenting to the location of such establishment, are unconstitutional.

At the outset it should be understood that the City has not made a blanket prohibition against the operation of adult businesses within its territorial limits. The City has merely attempted to regulate the location of such busi-

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[2] The invalidation of Ordinance 742-G by the Court of Appeals affects the City's attempt to control the proliferation of Group "D" ("topless") cabarets, even though the City's authority to regulate in this area was never argued before, nor considered by the Court of Appeals or the trial court. It is Petitioners' position that the ruling, if interpreted to invalidate regulation of cabarets, is clearly contrary to this Honorable Court's decision in *California v. LaRue*, 93 S Ct 390, 409 US 109, 34 L Ed 2d 342 (1972); and to *Crownover v Musick*, 509 P 2d 497, cert den 39 L Ed 2d 489 (Cal 1974).

[3] See Footnote 1, *supra*.

nesses in a manner and by a method which is conducive to the stable, physical development of its neighborhoods. The City is attempting to continue its long-standing efforts to regulate the location of those businesses which, when clustered together or located immediately adjacent to residential areas, are not conducive to the stability of the neighborhood, but rather create an atmosphere which drives away potential residents and merchants, adversely affects the living conditions in the neighborhood, forces a decline in property values and a resulting exodus of the residents and businessmen, and contributes to the general deterioration of the business districts and the surrounding residential neighborhoods which they serve.

In order to understand the necessity of regulating adult businesses, we must consider briefly the history of "regulated uses" in the zoning law of the City of Detroit.

The Zoning Enabling Act of Michigan, Act 207 of the Public Act of 1921, provides:

> "125.581. LOCATION OF TRADES AND BUILDINGS, USE; REGULATION BY LOCAL BODIES. SECTION 1. The legislative body of cities and villages may regulate and restrict the location of trades and industries and the location of buildings designed for specified uses and for such purposes divide any city or village into districts of such number, shape and area as may be deemed best suited to carry out the provisions of this section. For each of such districts regulations may be imposed designating the uses for which buildings or structures shall or shall not be erected or altered, and designating the trades and industries that shall be permitted or excluded or subjected to special regulations. Such regulations shall be made in ac-

cordance with a plan designed to lessen congestion on the public streets, to promote public health, safety and general welfare, and shall be made with reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the general trend and character of building and population development."

In 1962, the City of Detroit enacted Section 66.0000 of the Official Zoning Ordinance which classified certain businesses as "regulated uses". Section 66.0000 provided:

> "In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area (i.e., not more than two such uses within one thousand feet of each other which would create such adverse effects). Uses subject to these controls are as follows:
>
> Establishment for the sale of beer or intoxicating liquor for consumption on the premises.
> Hotels or motels
> Pawnshops
> Pool or billard halls

> Public lodging houses
> Secondhand stores
> Shoeshine parlors
> Taxi dance halls."

Section 66.0100 provides:

> "Application to establish any of above regulated uses shall be made to the City Plan Commission, who shall not approve any such request if there is already in existence two or more such regulated uses within one thousand feet of the boundaries of the site of the proposed regulated use, excepting as provided for in Section 66.0101."

Section 66.0101 allows for a waiver of the above prohibitions upon a showing of facts which would indicate that the business would not be injurious to surrounding properties. (App. G, p. 68).

The classification of these regulated uses were made after a determination by the Common Council that the "skid row" atmosphere which existed on Michigan Avenue, in the City of Detroit, was created in large part by the concentration of similar types of businesses which were not oriented to serve the needs of the immediate neighborhood, but primarily attracted persons from without the surrounding community who had little or no concern for the maintenance of a viable neighborhood. After much investigation it was determined that the groups of businesses which clustered on Michigan Avenue were a direct cause of the deterioration of the neighborhood. The City administration had spent millions of dollars in urban renewal to eliminate the conditions on Michigan Avenue, and replace the skid row with desirable and stable developments. Rather than face the possibility that those businesses which were displaced

by the urban renewal would congregate in other areas of the City, creating a similar situation resulting in blight and police problems, the City Council provided that no "regulated use" would be permitted to locate within 1,000 feet of any two other regulated uses. Recognizing that there might be extenuating circumstances in individual cases, the Common Council provided that the prohibition could be waived if it were demonstrated to the City Plan Commission that the location of a particular "regulated use", within 1,000 feet of two other such uses, would not adversely affect the neighborhood, nor contribute to a skid row atmosphere.

This concept of *inverse* zoning by the prohibition of more than two certain uses within 1,000 feet of each other was upheld in three separate cases in the Wayne County, Michigan, Circuit Court. *Michigan Pawnbrokers Ass'n.,* v. *Jerome P. Cavanagh, et al,* Wayne County Circuit Court No. 5458; *Miller, et al* v. *Jerome P. Cavanagh,* Wayne County Circuit Court No. 331-491, and *Rucker* v. *City of Detroit,* Wayne County Circuit Court No. 33-455. These cases were never appealed.

In enacting these ordinances much reliance was placed on the testimony of Sociologist Dr. Mel Ravitz, Professor of Sociology, Wayne State University, and former President of the Common Council, City of Detroit (App. J, pp 3-8). Briefly, Dr. Ravitz emphasized that most residential neighborhoods have a certain cohesion and stability that is sufficient to permit them to function adequately and healthfully. At the same time, Dr. Ravitz emphasized that a residential neighborhood is very fragile. It can be ruined very easily and "ruin comes usually not by dramatic physical events such as sheer age or the sudden invasion of barbarians . . . Ruin comes to a neighborhood because its residents somehow begin to have their confidence in the

area shaken . . . Good neighborhoods are maintained because the people who live in them believe that they are sound and good and will continue to be so in the months and in the years ahead." (App., J. p. 6) Dr. Ravitz also pointed out a sociological axiom that if people believe something is true, even if it is not originally, they will tend to act as if it were true, and in so doing, help produce the condition that originally was only believed: that if residents of any neighborhood believe that the concentration of the proscribed uses damage the neighborhood, they will act as if it were true, and will seek to move away and allow people with different standards to move in. They will allow their property to decline, and will not engage in the full range of activities necessary to the maintenance of a healthful residential neighborhood.

Prior to 1969, there were located in the City of Detroit only two bookstores and two theatres which would be classified under 742-G as "adult". Since that time, the *Redrup* decision by the Supreme Court and the *Bloss* decision of the Michigan Supreme Court, which ruled that the dissemination of obscene or pornographic materials could not even be challenged unless there was (1) pandering, (2) thrusting upon unwilling adults, or (3) minors involved *Redrup* v. *New York,* 386 US 767, 875 S. Ct. 1414, 18 L Ed 2d 515 (1967); *People* v. *Bloss,* 388 Mich 409 (1972), opened the gates for a burgeoning business in "adult" types of entertainment. The entrepreneurs in pornography immediately took advantage of the situation. By 1972, in Detroit alone, there were 18 adult theatres, 21 adult bookstores, and approximately 90 Class "D" cabarets. In a comparatively short time, many adult businesses located in the same vicinity, and created pockets or clusters which the Common Council determined, on the basis of information supplied to it, must be regulated to avoid a resur-

gence of the skid row alluded to above, to protect the property values of the surrounding businesses and residences, and to maintain confidence in and stability of the neighborhoods. The information provided the Common Council as to the clustering of adult businesses, and their adverse effect on surrounding business and residential districts, is contained in the report from the Obscenity Division, Detroit Police Department, (App., J. pp. 13-16) and in concise affidavits by William Walsh and Ogust Mai Stewart, Realtors and Appraisers, (App., J. pp. 16-25). See also copy of letter from Carl H. Schmidt Co., Eight Mile Road, Detroit, addressed to Mayor Roman Gribbs, advising the Mayor that "primarily because of the adult bookstore, we are leaving Detroit". (App., J. pp. 26-27).

The Common Council was also mindful of the skid row atmosphere created in the 42nd Street District of Manhattan, New York, where entepreneurs in pornography had taken over an entire section of the City, resulting in a formidable increase in street crimes, prostitution and dope peddling. See affidavit and articles by Miss Gail Sheehy, Contributing Editor of *New York* Magazine, (App. J., pp. 29-34) and article by Edward Ramzal, December 18, 1972, New York Times, (App., J pp. 35-37) wherein it is stated:

> "The large amounts of cash found on hand—one parlor safe contained $17,000.00 in small bills—called attention to the fact that legitimate businesses were being driven out of the Times Square area because the 'massage parlors' and 'store front peep shows' were paying double and triple the rent that legitimate businesses could afford. Seymour Durst, the head of the Durst organization, a large real estate enterprise that is trying to drive pornography out of the midtown area, has stated that he had been offered $1,000.00 a month for small stores that he rented to little eating places for $500.00 a month."
>
> "'Peep shows," he said "can pay a very high rent and some property owners have figured that the only thing that will carry the property is porno.'"

Confronted with this information, and numerous complaints from residents and businessmen alike, the Common Council of the City of Detroit determined that it was absolutely necessary to regulate by licensing and zoning, adult types of entertainment, whether it be theaters, bookstores, peep-shows or Class "D" cabarets.

The Court of Appeals noted, and apparently has determined that "although the application of the ordinances is confined to 'adult' forms of entertainment, they are not designed to protect minors from harmful influences." The briefs and affidavits submitted by Petitioners refute this contention as they repeatedly emphasize the necessity of protecting and preserving the residential areas of the City and the business districts which serve them. Ordinances seeking to protect and preserve residential zoning districts have always been enacted with the intent of providing a suitable atmosphere for family living, and a suitable atmosphere to raise children. This basic principle of zoning residential areas to provide for *family* needs has been consistently recognized by our courts, most recently in *Berman* v *Parker*, 348 US 26 (1945) and *Village of Belle Terre* v. *Boraas*, 416 US 1 (1974) where a zoning ordinance was recognized as:

> ". . . economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the equal protection clause if the law be 'reasonable, not

arbitrary,' (citation omitted) and bears 'a rational relationship to a (permissible) state objective.'. . .

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

Obscenity is not an issue in the case at bar. The dissemination of "obscene" or "pornographic" material may be, and is now totally prohibited in the City of Detroit. In its June, 1973 rulings on obscenity, the United States Supreme Court clearly and emphatically held that obscene material was *not* protected by the First Amendment, and could be suppressed, either by criminal or civil sanctions. See *Miller* v. *California,* 413 U.S. 15, 37 L Ed 2d 419 (1973) and *People* v. *Bloss,* 27 Mich App 687; overruled in 388 Mich 409 (1972); vacated and remanded 413 US 909; 37 L Ed 2d 1021 (1973). In December of 1974 the City adopted an ordinance prohibiting pornography, based on the *Miller* guidelines.

Even though there is now no question that pornography may be banned, there remains the very real problem of controlling the influx of adult businesses whose stock in trade, whether films, magazines or performances, are entitled to display and/or distribution before any judgment may be made as to whether the material offered is pornographic. In addition, unless and until the courts rule that the use of an establishment to exhibit or sell obscene press materials or films is abateable as a nuisance, continued and

repeated convictions for disseminating pornographic material will not close those business establishments which are the continuing, visible sources of material which is offensive to the neighboring business and residential community, whether or not the material has been legally determined to be pornographic. Experience has shown that one or more convictions against an establishment does not force its closure, nor does it offer any protection to the neighborhood.

The necessity for zoning adult businesses, which offer material which may or may not be pornographic, was discussed at length during oral argument before the Hons. Kennedy and Gubow (App. L., pp. 47-50). The discussion ended with the following remarks:

> Judge Kennedy: "What you are saying is that the criminal law won't preserve the neighborhood."
> Mrs. Reilly: "That's right, your Honor. Thank you. She said it in a nutshell . . ."

The City recognizes that even though it is zoning the use of property, and licensing the operation of a business, it is regulating the manner in which material, presumably protected by the First Amendment, may be disseminated. However, it cannot be emphasized enough that the zoning and licensing ordinances only regulate, *but do not prohibit* the dissemination of adult material in the City of Detroit.

This Honorable Court has carved certain exceptions to the general rule that "pure speech" is protected by the First Amendment. These exceptions include expressions of ideas, in whatever form, which are obscene, *Roth* v. *United States,* 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304 (1957); *Miller* v. *California, supra;* which threaten a clear and present danger of bringing about a substantial evil

which the government has power to prohibit, *Associated Press* v. *United States*, 326 US 1, 89 LEd 2013, 65 S Ct 1416, Reh Den 326 US 802, 803, 90 L Ed 489, 66 S Ct 6, 7 (1944); which involve so-called "fighting words", those personally abusive epithets which, when addressed to the ordinary citizen, are as a matter of common knowledge inherently likely to provoke violent reaction. *Chaplinsky* v. *New Hampshire*, 315 US 568, 86 L Ed 1031, 62 S Ct 766 (1942). *Feiner* v. *New York*, 340 US 315, 95 L Ed 295, 71 S Ct 303 (1951). This Court has ruled that these exceptions are not protected by the First Amendment, and may be *totally* prohibited.

Where, however, protected "speech" is combined with "non-speech" elements in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. Consonant with this ruling, the U.S. Supreme Court has upheld the authority of governmental units to regulate picketing, *Shuttlesworth* v. *Birmingham*, 394 US 147, 22 L Ed 2d 162, 89 S Ct 935 (1969), the activities of lobbyists, *United States* v. *Harris*, 347 US 612, 98 L Ed 989, 74 S Ct 808 (1953), the operation of sound trucks, *Kovacs* v. *Cooper*, 336 US 77, 93 L Ed 513, 69 S Ct 448, 10 ALR 2d 608 (1949); activities near a school, *Grayned* v. *City of Rockford*, 408 US 104, 33 L Ed 2d 222, 92 S Ct 2294 (1972); and picketing near a Courthouse which may interfere with the administration of justice, *Cox* v. *Louisiana*, 379 US 559, 85 S Ct 476, 13 L Ed 2d 487 (1965). See also: *McAlpine* v. *Reese*, 309 F Supp 136 (DC 6th Cir 1970). In each of these cases, the courts held that the government had a "substantial" or "compelling" interest which justified its regulation (not prohibition) of speech when it was intertwined with conduct.

"What the defendants overlook in this argument is what has been described as 'interwining.' *Cox* v. *Louisiana*, 379 U.S. 559, 85 S Ct 476, 13 L Ed 2d 487, quoted with approval in *Cameron* v. *Johnson*, *supra*, pointed out that 'picketing and parading (are) subject to regulation even though interwined with expression and association.' The ordinance before us does not in terms prohibit any kind of gathering or of expression save that which disturbs the quietude of a school. Those interested in this form of expression are free to congregate elsewhere, to propagandize, to meet, to speak, to persuade, and debate—but not in so doing to disturb the schools. In short, and as we have heretofore observed, the ordinance deals with a topic of great and fundamental interest to our society, namely, the schools and their undisturbed operation. *Conduct at variance with this objective may be proscribed.* As well put in *Cox*, *supra*, 379 U.S. at 564; 85 S Ct at 481 'the fact that free speech is intermingled with such conduct does not bring with it constitutional protection'." *McAlpine* v. *Reese*, 309 F Supp 136 (1970).

This Honorable Court has also recognized that certain material, ordinarily protected by the First Amendment, may be regulated by the State in order to provide safeguards for certain segments of the society which should be protected, such as children. *Interstate Circuit Inc.*, v. *Dallas*, 390 US 676, 20 L Ed 2d 255, 88 S Ct 12, 98 (1968); *Ginsberg* v. *State of New York*, 390 US 676, 20 L Ed 2d 195, 88 S Ct 1274, Reh Den 391 US 971, 20 L Ed 2d 887, 88 S Ct 2029 (1968).

The standards or criteria which must be met to justify governmental regulation of protected speech have been

defined in *United States* v. *O'Brien*, 391 US 367, 20 L Ed 2d 672, 88 S Ct 1673 (1968):

> " We cannot accept the view that an apparently, limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." • • • This Court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essention to the furtherance of that interest."

There is no argument here that the City does not have the power to license and zone. It is the respondents' contention that these powers may not be directed towards their operation of a business dealing in materials presumably protected by the First Amendment. As fully explained above, these regulations are directed towards the achievement of a legitimate governmental purpose, the preservation and stabilization of neighborhoods in the city. Clearly, as required by this Supreme Court in *O'Brien, supra,* the governmental interest sought to be achieved is unrelated to the suppression of free expression; the First Amendment rights involved here are indirectly regulated, but not prohibited. Finally, the incidental restriction on the alleged First Amendment rights claimed here are no greater than are essential to further the City's purpose in regulating those businesses which tend to cause deterioration of neighborhoods. All motion picture theaters, bookstores and cabarets are not regulated—only those theaters, bookstores and cabarets which offer "adult" entertainment as is specifically and narrowly defined in the ordinance.

Arguments based on "basic constitutional rights" similar to those raised here, were recently raised in *Village of Belle Terre* v. *Boraas, supra.* In this zoning case, the first decided in many years by the United States Supreme Court, the Court upheld a village zoning ordinance restricting land use to one family dwellings and excluding lodging houses, boarding houses, fraternity houses and multiple dwelling houses, rejecting the contention that the ordinance violated a person's right of interstate travel, the right of association, the right of access to the court, and the right of privacy. The Court ruled that the ordinance, which prohibited occupancy of a dwelling by more than two unrelated persons as a "family", while permitting occupancy by any number of persons related by blood, adoption or marriage, was, a reasonable exercise of the legislative discretion in drawing a "statutory line", and bore a rational relationship to a permissible state objective. In defining the extent of the police powers in relation to zoning, the Court stated:

> "We refused to limit the concept of public welfare that may be enhanced by zoning regulations. We said:
>
> 'Miserable and disreputable housing conditions may do more than spread disease and crime and

immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost unsufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

'We do not sit to determine whether a particular housing project is or is not desirable. The concept is or is not desirable. The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.' Id., 32-33, 99 L Ed 27.

• • • • •

"A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within *Berman* v. *Parker, supra.* The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people."

These same guidelines may be applied to the case at bar.

The respondents' position that a compelling State interest does not exist here is totally unrelated to reality. A city government's interest in self-preservation outweighs the

tenuous claim made by respondents that they are entitled to conduct a business dealing in First Amendment protected material without any regulation whatsoever. The need to provide a suitable atmosphere for family living and a suitable atmosphere to raise children, to avoid blight and decay of neighborhoods, to conserve property values, and to attract rather than dispel concerned citizens willing to maintain their neighborhoods, is compelling justification for the regulations imposed by the City of Detroit.

II.

A COMPELLING STATE INTEREST HAVING BEEN SHOWN, THE ZONING AND LICENSING REGULATIONS ARE BASED UPON A REASONABLE CLASSIFICATION, AND BEAR A REASONABLE RELATION TO THE LEGITIMATE GOVERNMENTAL PURPOSE SOUGHT TO BE ACHIEVED.

In its attempt to prevent the creation of clusters of adult types of entertainment, resulting in skid rows or strips having a debilitating effect on the surrounding neighborhoods, the City has utilized two methods which it is empowered to use by virtue of State Statute and City Charter. As indicated above, the State Zoning Enabling Act authorizes cities to regulate and restrict the location of trades and industries, and the location of buildings designed for specified uses, and to subject them to special regulations which shall be made in accordance with a plan designed to promote the general welfare; giving reasonable consideration to the character of the district, its peculiar suitability for particular uses, the conservation of propery values, and the general trend and character of building and population development. In 1972, when the challenged ordinances were adopted, Title III, Chapter 1, Section 12 of the Detroit City Charter provided that the Com-

mon Council shall have the power and the duty "to promote the general peace, health, safety, welfare and good government of the City; and "to provide for the regulation of trades, occupations, and amusements, and to provide for the prohibition of such trades, occupations and amusements as are detrimental to the health, morals or welfare of its inhabitants." Where the power to legislate upon a given subject is conferred, but the mode and its exercise is not prescribed, the ordinance passed in pursuance thereof must be a reasonable exercise of the power. *People* v. *Armstrong,* 73 Mich. 288 (1889). It is only when a municipal ordinance is clearly and manifestly unreasonable or oppressive in its operation, that it will be declared void. *Building Commission of Detroit* v. *Kunin,* 181 Mich 604 (1914). Various city ordinances licensing legitimate businesses and subjecting them to further controls have been repeatedly upheld by the Michigan Supreme Court. *City of Grand Rapids* v. *Braudy,* 105 Mich. 607 (1895); *People* v. *Pennock,* 294 Mich '78 (1940). *Brazee* v. *Michigan,* 241 US 340; 16 L Ed 1034, 36 S Ct 561 (1916); *Mutchell* v. *City of Kalamazoo,* 323 Mich 215 (1948); *Hughes* v. *City of Detroit,* 217 Mich. 567 (1922); *Eastwood Park Amusement Co.* v. *Mayor of East Detroit,* 325 Mich 616 (1925); *People* v. *Harley,* 230 Mich. 676 (1925); *Melconian* v. *City of Grand Rapids,* 218 Mich 397 (1922). *Prawdzik* v. *City of Grand Rapids,* 313 Mich. 376 (1946).

The classification of certain businesses as "regulated uses" which may not locate within 1,000 feet of two other "regulated uses," in order to avoid the clustering or congestion of these types of businesses, and the resulting blighting effect on the surrounding neighborhood, was upheld in three Wayne County Circuit Court cases, as indicated above. Similar locational restrictions have been upheld in *O'Connor, et al v. Board of Zoning Appeals of*

Town of Stratford, 140 Conn 65, 98 A 2d 515 (1953); *Kamerman* v. *Leroy,* 133 Conn 232, 50 A 2d 175 (1946), and *Glackman* v. *City of Miami Beach,* 51 S 2d 294 (Fla 1951).

Having demonstrated that a compelling State interest exists necessitating the regulation of the location of adult types of entertainment, the choice of methods to achieve that end, which is selected by the Common Council, if reasonable, should not be rejected by this Court. After extensive investigation and study, the Mayor's Task Force on Licensing and Zoning Procedures recommended to the Common Council of the City of Detroit that adult types of entertainment be designated as "regulated uses" so that they might be restricted in their location in various parts of the City. In addition, it was recommended by the Mayor's Task Force, that inasmuch as adult types of entertainment are businesses which have been demonstrated to have a direct impact on the conditions in the neighborhood, that the consent of the neighboring citizens should be obtained before one of these businesses would be permitted to locate within 500 feet of a residential area.[4]

A regulation which prohibits the location of a certain business within a certain distance from a residential area, but permitting the prohibition to be waived upon the showing of the consent of a certain percentage of the neighboring community, has been upheld by the United States Supreme Court and the Michigan Supreme Court. In *Cady* v. *City of Detroit,* 289 Mich 499 (1939), the issue was met head on. There the Court stated:

> "'It may be said in a general way that the police power extends to all the great public needs.' • • • It

[4] See footnote 1, *supra.*

may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' *Noble State Bank* v. *Haskell*, 219 U.S. 104 (31 Sup. Ct. 186, 32 L.R.A. (N.S.) 1062, Ann. Cas. 1912A, 487).

"Ordinances having for their purpose regulated municipal development, the security of home life, the preservation of a favorable environment in which to rear children, the protection of morals and health, the safeguarding of the economic structure upon which the public good depends, the stabilization of the use and value of property, the attraction of a desirable citizenship and fostering its permanency are within the proper ambit of the police power. Changes in such regulations must be sought through the ballot or the legislative branch."

"Regarding the complaint that the requirement of consent of 65 per cent of property owners within 600 feet of such camp must be secured before a license can be granted is unreasonable, we are constrained to hold that such conditions are valid and do not result in the delegation of a legislative power by the city to such adjacent property owners. In *Thomas Cusack Co.* v. *City of Chicago*, 242 U.S. 526 (37 Sup. Ct. 190, L.R.A. 1918A, 136 Ann. Cas. 1917C, 594), where an ordinance prohibited the erection of billboards in ertain blocks, but permitted the prohibition to be modified with consent of adjacent property owners, it was held that such an ordinance was not a delegation of legislative power but a familiar provision affecting the enforcement of laws and ordinances. 'A distinction is made between

ordinances or regulations which leave the enactment of the law to individuals and ordinances or regulations prohibitory in character but which permit the prohibition to be modified with the consent of the persons who are to be most affected by such modification.' 43 C.J. p. 246.

"If such consent is used for no greater purpose than to waive a restriction which the legislative authority itself has created and in which creation it has made provision for waiver, such consent is generally regarded as being within constitutional limitations. *City of East Lansing* v. *Smith*, 277 Mich 495."

Reasonable zoning and licensing of adult businesses which regulate, but do not prohibit the operation of a business dealing in materials presumptively protected by the First Amendment is far different from the total prohibitions which were rejected by the United States Supreme Court in *Near* v. *Minnesota*, 283 U.S. 697 (1931); and *Schneider* v. *Irvington*, 308 U.S. 146, 84 L Ed 2d 155 (1939).

The classification of "adult" theatres, bookstores, and cabarets on the basis of the content of the material disseminated therein, is a reasonable classification for purposes of licensing and zoning because a) the owners and operators readily admit that they refuse to admit minors, and b) the deleterious effects on the surrounding neighborhood are caused, not by all theatres and bookstores, but by only those businesses catering to the sexual appetites of their customers.

A similar classification was allowed to stand by this Court when it recently denied certiorari in the case of *106 Forsythe Corp.* v. *Bishop*, No. 73-1176, the effect of which allows the ruling of the Federal Court of Appeals, 482 F

2d 280 (5th Cir 1973), and the District Court, 362 F Supp 1389 (Ga. 1972), to stand. Those decisions upheld ordinances enacted by the City Council of Athens, Georgia, similar to those challenged in the cases at bar, which classify "adult" motion picture theatres separate and apart from other theatres, require them to be licensed, permit revocation of a license by the mayor for violation of the state obscenity law, and regulate by zoning location of the adult theatres.

The District Court in Georgia rejected the argument by the theatre owner that the ordinances were violative of the Fourteenth Amendment, stating that the classification was not a denial of equal protection:

> "It ill befits plaintiff to question the legislative judgment that adult movie theatres are subject to zoning regulations and to being classified differently from ordinary movie theatres since plaintiff itself has resorted to classification by restricting exhibition to adults only. The legislature and Mayor and Council are going a short step further than plaintiff by restricting the locale in which the adult theatre can operate. The statute and the ordinance pursuant thereto did not prohibit the showing of adult movies; they only regulated the place of the showing. These legislative bodies may have, and doubtless did, conclude that these types of shows are undesirable in the prohibited locations in that (1) the type of clientele which may be attracted would be inimical to the best interests of the institutions and places sought to be protected, (2) although children are said to be barred they should be freed from the constant reminder that something is taking place in their midst which they must not

> see, and (3) there is always the possibility that self-imposed discipline may not be effective. Such reasoning has long been sufficient to justify zoning with respect to alcoholic beverages. Whatever the reasoning was, "debatable questions as to reasonableness are not for the courts but for the Legislature . . . " *Goldblatt, supra,* 369 U.S., at 595, 82 S Ct at 990. (at p. 1393).

The District Court further found that the licensing ordinance was ". . . not void for overbreadth, or for failing to provide standards to guide in the revocation, or for vagueness, or as imposing 'prior restraint', or as precluding the right to judicial review, or for any other reason alleged."

That decision was upheld by the Federal Court of Appeals, and will continue to be the law in the 5th Circuit, in view of the recent denial of certiorari by this Honorable Court.

It should be emphasized here that the operation of a business which deals in the dissemination of "adult" material is a far cry from the fleeting or briefly exposed expressions protected by the First Amendment in cases such as *Cohen* v. *California,* 403 U.S. 15, 29 L Ed 2d 284, 91 S Ct 1780, where the court held that the words "fuck the draft" inscribed on a person's jacket were not such an intrusion on others' privacy as to warrant governmental regulation.

The establishment of an "adult" business, either in a cluster of businesses known to have an adverse effect on the surrounding properties, or immediately adjacent to a residential area, is a far greater intrusion on the rights of the captive families and businessmen who serve them

than was found in *Lehman* v. *Shaker Heights,* 41 L Ed 2d 770 (1974) where this Court upheld a classification of advertising on City busses on the basis of content, ruling that the City properly refused political advertising which it deemed inimicable to the "captive" passengers on the bus.

> "No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the City in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation." 41 L Ed 2d at 778.

In the case at bar, we are concerned with the operation of a business which comes, and stays, and contributes directly either to the well being and stability of a neigborhood, or to its deterioration, blight and decay. Adjoining property owners have no choice in the matter. Without governmental regulation, there is no means by which adjoining property owners may control or even influence the use to which property is put another landowner. Reasonable control over the use to which property may be put has been traditionally lodged in the governmental units and must be retained if there is to be any sensible pattern of development in our cities. It is only through the government that a well-planned community may develop. The amended provisions of [redacted] 66.000, which prohibit the location of more than [redacted] types of "adult" entertainment within 1,000 feet of each other, or of other regulated uses, and which prohibits their location within 500 feet of a residentially zoned district, unless such prohibition is waived by the consent of 51% of the persons living or doing business within a 500 foot radius of the proposed location, is the only reasonable means of restricting the number of regulated uses which may locate in a certain neighborhood, and of insuring the continued support and commitment to the neighborhood of those persons presently residing and doing business therein.[5]

In the *Cox* v. *Louisiana* case, *supra,* this Honorable Court found that a compelling state interest existed in protecting the administration of justice in the court system, and recognized a classification of a certain kind of picketing, i.e., picketing "with the intent of influencing the administration of justice", which classification dealt directly with the content of the message being conveyed by the picketers. This court upheld the prohibition against the type of picketing only, in those locations where the disruptive message was interfering with the administration of justice. Similarly, in the case at bar, the City of Detroit has demonstrated a compelling state interest in the preservation and stabilization of its neighborhoods. This compelling state interest has been recognized both at the trial and appellate court levels. In a 2-1 decision, the Sixth Circuit Court of Appeals has ruled that, regardless of the deleterious effects caused to the surrounding neighborhoods by adult businesses, which adverse effects are not caused by non-adult businesses, the City cannot treat the two classes separately, if the regulation requires a classification based upon the *content* of the material disseminated. Petitioners respectfully submit that that was not, and is not, a correct interpretation and application of the First and Fourteenth

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[5] An extensive list of those public amusements which are prohibited within 500 feet of a residence, unless such prohibition is waived by the consent of 51% of the surrounding neighborhood, may be found in Sec. 5-2-1.1 of the Detroit Municipal Code.

Amendments to the United States Constitution, and is contrary to the ruling in *Cox* v. *Louisiana, supra.*

In that case, this Honorable Court permitted a regulation of conduct interwined with a certain classification of speech, in a certain location, when it was established that regulation of the particular kind of speech, i.e., "that which affects the administration of justice", when interwined with conduct, i.e., group demonstrations, in a particular location, i.e., at or near a courthouse, was necessary, and no more restrictive than necessary, to achieve a legitimate governmental interest. Petitioners respectfully submit that the challenged ordinances in the case at bar, similarly, regulate specific conduct, i.e., the establishment of adult businesses, which are classified according to the content of the material disseminated, i.e., material which is "distinguished or characterized by an emphasis on specified sexual activities or specified anatomical areas".

The regulation is not a total prohibition, but precludes the establishment of "adult" businesses in certain *locations*, i.e., within 1,000 feet of any two other regulated uses, and within 500 feet of a residentially zoned district. Even these prohibitions may be waived under certain conditions. As noted by Judge Celebrezze, the ordinances are no more restrictive than necessary, and the alternative solutions posed by the majority are no real solutions at all.

The power granted to the City relating to the licensing of these adult entertainments (adult bookstores are not licensed) are extremely limited. The applicable provisions of Sec. 5-2-2 of the Detroit Municipal Code which provides that prior to the issuance of a license certain City Code requirements (Electrical, Building, Plumbing, etc.) must be complied with are reasonable regulations which are required of all businesses open to the public in the City of Detroit.

"The fact that plaintiffs seek to exercise First Amendment rights does not prohibit the municipality from imposing regulations under its police power. The regulations must, however, have a substantial relationship to the public health, safety, morals, or welfare. The commercial enterpreneur can legitimately be subjected to license regulations which, for example, require a reasonable and nonconfiscatory license fee to provide additional revenue to offset increased municipal expenses resulting from the licensee's operation. Likewise, regulations which require that the licensee's business premises comply with health, safety, and fire laws, and which provide means for inspection to assure compliance, would unquestionably be deemed reasonable." *Soof* v. *City of Highland Park,* 30 Mich App 400 (1971).

The guidelines of Ord. 743-G (Sec. 5-2-3) providing standards for issuing or denying a license were upheld against constitutional challenges in *Tally* v. *City of Detroit,* 54 Mich App 328, Rehearing 58 Mich App 261 (1975).

The constitutional guarantee of free speech and press does not require absolute freedom to exhibit every motion picture of every kind at all times and places. Nor are motion pictures necessarily subject to the precise rules governing any other particular method of expression. In *Burstyn* v. *Wilson,* 343 U.S. 495, 96 L Ed 1098, 72 S Ct 777 (1951), the U.S. Supreme Court recognized that motion pictures posed problems different than those posed by other modes of expression, and stated that if there be capacity for evil, it may be relevant in determining permissible scope of community control. See, also, *Times Film Corp.* v. *Chicago,* 365 US 43, 5 L Ed 2d 403, 81 Sup Ct 391

Reh. Den. 365 U.S. 856, 5 L Ed 2d 820, 81 Sup. Ct. 798 (1961).

Contrary to the contention of the respondents, the zoning and licensing provisions described above are clearly the utilization of the best methods available to achieve a legitimate governmental purpose, the conservation of property values, the preservation of stability in the neighborhood, and the fostering of pride in the community.

The benefits to be derived from zoning regulations, such as are under consideration here, are well expressed in *Cady* v. *City of Detroit, supra,* at page 512:

> "'It cannot be denied that a city systematically developed offers greater attractiveness to the home seeker than a city that is developed in a haphazard way. The one compares to the other about as a well-ordered department store compares to a junk shop. If such regulations stabilize the value of property, promote the permanency of desirable home surroundings, and if they add to the happiness and comfort of the citizens, they thereby promote the general welfare. • • •
>
> 'The benefits to be derived by cities adopting such regulations may be summarized as follows: They attract a desirable and assure a permanent citizenship; they foster pride in and attachment to the city; they promote happiness and contentment; they stabilize the use and value of property and promote the peace, tranquillity, and good order of the city. We do not hesitate to say that the attainment of these objects affords a legitimate field for the exercise of police power. He who owns property in such a district is not deprived of its use by such regulation. He may use it for the purposes to which

> the section in which it is located is dedicated. That he shall not be permitted to use it to the desecration of the community constitutes no unreasonable or permanent hardship and results in no unjust burden.' • • •'"
>
> • • • • •
>
> "'As in other applications of the police power, the difficulty concerning regulations relating to real property is in attempting to draw the line between constitutional regulation and unconstitutional invasion. The tendency is to uphold such legislation as valid regulation, for, under the modern view, the police power extends to attracting a desirable citizenship to a particular locality of a municipality and assuring its permanency, to fostering pride in, and attachment to, the city, to promoting happiness and contentment, to stabilizing the use and value of property, and to promoting the public tranquillity and good order of the city. Present-day conceptions of the extent of the public interest, particularly in relation to the public welfare, are very broad; hence, many restrictions on the uses to which real property may be put, many limitations on the type of structures which may be erected on premises in certain localities, in many groupings in definite localities of the enterprises which may be carried on on real property are now sustained as valid exercises of the police power which a few years ago in most jurisdictions were regarded as invalidly invading the constitutional rights of the property owner.'"

In conclusion we recommend to the Court's consideration the words of the Hon. Anthony Celebrezze, 6th Circuit Court of Appeals, in his dissenting opinion in this case.

"The majority suggests that the City could devise a less restrictive and even-handed method of furthering its objective. It suggests no less restrictive alternative, however, and I can see none. If Detroit is to prevent its neighborhoods from turning into sex-oriented skid rows, catering to the tastes of only one stratum of society and driving out stable residential populations, it must be allowed to limit the number of adult establishments in any area of the City. That is what the 1000-foot provision seeks to do.

"Nor does the majority suggest a feasible, more evenhanded approach. It suggests that Detroit could legally accomplish its goals by requiring *all* bookstores and theaters to locate in enclaves within the City or by restricting their hours of operation. Neither solution would serve the purpose of preventing concentrations of "adult" businesses. Indeed, the first suggested solution would accomplish precisely what Detroit seeks to prevent. Both solutions, furthermore, would impose restrictions on non-adult bookstores and theaters that have no relation to any demonstrated legitimate public purpose. Thus, they would run afoul of the first two parts of the *O'Brien* test. The majority's call for "even-handed" legislation would suggest that it considers adult and non-adult bookstores and theaters to pose similar threats to the stability of neighborhoods. The record in this case belies this conclusion and establishes the legitimate reasons for treating adult establishments in the same manner as pool rooms and bars, without treating non-adult theaters and bookstores similarly.

"I too am vigilant to protect our First Amendment freedoms. They must not be eroded out of misguided good intention. The Frst Amendment, however, was not intended to be the death-knell of cities. Detroit has carefully attempted to prevent its neighborhoods from becoming sex-oriented, crime-ridden wastelands, without unduly infringing the public's right to buy and the publisher's right to distribute non-obscene materials. The First Amendment does not condemn this effort.

"It seems to me that if we are to prevent our cities from becoming unthinkable jungles, we must, within constitutional safeguards, restore to our cities the right of self-government."

III.

THE PROVISIONS OF THE NEW ZONING AND LICENSING LAWS ARE NOT VAGUE OR OVERBROAD, BUT ARE CLEARLY DEFINED WITH NARROW SPECIFICITY AND ARE DIRECTED ONLY AGAINST THOSE BUSINESSES WHICH, IN THE INTEREST OF THE GENERAL WELFARE, MUST BE REGULATED.

The respondents have asserted that the provisions of the new zoning and licensing regulations are vague, overbroad and an unconstitutional classification. The sweeping statements made by respondents in their complaints do not direct our attention to any particular phrases or words in the new laws, yet then emphatically claim (1) that the ordinances are so vague as to convey no definite meaning; and (2) the ordinances are so broad that they infringe on First Amendment rights which, according to respondents, cannot even be regulated. Respondents' apparent position is that unless written or filmed material is legally obscene

or pornographic, the state may not, in any way, regulate the manner or location in which the "protected" material is produced or disseminated. This claim is clearly contrary to the many United States Supreme Court decisions, discussed below, which emphasize that the state may reasonably regulate expression protected by the First Amendment, even though the state would not be permitted to totally prohibit protected expression.

As "adult bookstores," "adult motion picture theatres," and "Class D cabarets" are subject to the new zoning provisions, and adult theatres and Class "D" cabarets are subject to the new licensing provisions, we set forth here, for the convenience of the court, the definitions of those phrases as they appear in Section 5-2-1.2 of the Detroit Municipal Code, (Ordinance 743-G) and Section 32.0007 of the Official Zoning Ordinance of the City of Detroit (Ordinance 742-G):

"Adult Book Store

An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter, depicting, describing, or relating to "specified sexual activities' or 'specified anatomical areas,' (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.

Adult Motion Picture Theatre

An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or specified anatomical areas,' (as defined below), for obesrvation by patrons therein."

"Adult Mini Motion Picture Theatre

An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas,' (as defined below), for observation by patrons therein.

For the purpose of this Section, 'Specified Sexual Activities' is defined as:

1. Human genitals in a state of sexual stimulation or arousal.
2. Acts of human masturbation, sexual intercourse or sodomy;
3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

And 'specified anatomical areas' is defined as:

1. Less than completely and opaquely covered; (a) human genitals public region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered."

Again, we emphasize that adult book stores are not licensed, but are merely subject to the zoning regulations.

The constitutional requirement of definiteness is violated by a statute or ordinance that fails to give a person of ordinary intelligence fair notice that his contemplated con-

duct is forbidden or regulated by the statute or ordinance. The underlying principle is that no man shall be held responsible for conduct which he could not reasonably understand to be proscribed. The U.S. Supreme Court in *United States* v. *Harriss, supra,* after enunciating the above general rule, stated:

> " . . . on the other hand, if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. *United States* v. *Petrillo,* 332 US 1, 7, 91 L Ed 1877, 1882, 67 S Ct 1538. Cf. *Jordan* v. *DeGeorge,* 341 US 223, 231, 95 L Ed 886, 893, 71 S Ct 703. And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction. This was the course adopted in *Screws* v. *United States,* 325 US 91, 89 L Ed 1495, 65 S Ct 1031, upholding the definiteness of the Civil Rights Act."

Although the U.S. Supreme Court has ruled that laws regulating speech protected by the First Amendment must be drawn with "narrow specificity", it does not require exactitude. Rejecting such an argument, the United States Supreme Court in *Cameron* v. *Johnson,* 390 U.S. 611, 20 L Ed 2d, 182, 88 S Ct 1335 (1968), stated:

> "Appellants advance a two-pronged argument. First, they argue that the statute forbids picketing in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . " *Connally* v. *eGneral Construction Co.,* 269 US 385, 391, 70 L Ed 322, 328, 46 S Ct 126. But the statute probits only 'picketing . . .

> in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses . . . ' The terms 'obstruct' and 'unreasonably interfere' plainly require no 'guess(ing) at (their) meaning.' Appellants focus on the word 'unreasonably.' It is a widely used and well understood word and clearly so when juxtaposed with 'obstruct' and 'interfere.' We conclude that the statute clearly and precisely delineates its reach in words of common understanding. It is a 'precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be . . . proscribed.' *Edwards* v. *South Carolina,* 372 US 229, 236, 9 L Ed 2d 697, 702, 83 S Ct 680."

So, also, in *Cox* v. *Louisiana, supra,* the United States Supreme Court held that the failure of the legislature to define "near", when prohibiting picketing near a courthouse, did not render it unconstitutionally vague:

> "It is clear that there is some lack of specificity in a word such as 'near'. While this lack of specificity may not render the statute unconstitutionally vague, at least as applied to a demonstration within the sight and hearing of those in the courthouse, it is clear that the statute with respect to the determination of how near the courthouse a particular demonstration can be, foresees a degree of on-the-spot administrative interpretation by officials charged with responsibility for administering and enforcing it. It is apparent that demonstrators, such as those involved here, would justifiably tend to rely on this administrative interpretation of how 'near' the courthouse a particular demonstration might

take place. Louisiana's statutory policy of preserving order around the courthouse would counsel encouragement of just such reliance. This administrative discretion to construe the term 'near' concerns a limited control of the streets and other areas in the immediate vicinity of the courthouse and is the type of narrow discretion which this Court has recognized as the proper role of responsible officials in making determinations concerning the time, place, duration, and manner of demonstrations. See *Cox* v. *New Hampshire* 312 US 569, 85 L Ed 1049, 61 S Ct 762, 133 ALR 1396; *Poulos* v. *New Hampshire,* 345 US 395, 97 L Ed 1105 (73 S Ct 760, 30 ALR2d 987. See generally the discussion on this point in No. 24, 379 US 553-558, 13 L Ed pp. 483-496. It is not the type of unbridled discretion which would allow an official to pick and choose . . . " (13 L Ed 2d 494).

See also *Lanzetta* v. *New Jersey,* 306 US 451, 83 L Ed 888, 59 S Ct 618; Note, *The Void for Vagueness Doctrine in the Supreme Court* 109 U Pa L Rev. 67.

Just as the words "unreasonably" "interfere" or "near" are relative terms, so the words "distinguished or characterized by" and "substantial" are relative. They are not, however, vague. "Substantial" means "material," "considerable", "more than slight or petty." See 40 *Words and Phrases,* "Substantial" pages 757-764. The word "substantial" has been used repeatedly by the U.S. Supreme Court, and particularly in its description of the sufficiency of interest which must be demonstrated by the government before the government may regulate expression protected by the First Amendment.

The words "distinguished" or "distinguishing" are frequently used in statutes relating to ballots. See *Words and*

Phrases "Distinguished Ballot," "Distinguishing Mark." As noted by the Hons. Kennedy and Gubow in their opinion at the trial level, the terms "characteristic" and "characteristic of" appear in various workmen's compensation statutes in which an injury must be characteristic of a business of the employer in order to be compensable as an occupational disease. *Carter* v. *International Detrola Corp.* 328 Mich 367 (1950).

Respondents again generalize, claiming that the new ordinances are "overbroad." Again, we refer the court to its opinion rendered in *Cameron* v. *Johnson, supra,* at page 188:

> "The second prong of appellants' argument is that the statute, even assuming that it is 'lacking neither clarity nor precision, is void for "overbreadth," that is, that it offends the constutional principle that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Zwickler* v. *Koota, supra,* at 250, 19 L Ed 2d at 451. The argument centers on the fact that the proscription of the statute embraces picketing employed as a vehicle for constitutionally protected protest. But 'picketing and parading (are) subject to regulation even though interwined with expression and association,' *Cox* v. *Louisiana,* 379 US 559, 563, 13 L Ed 2d 487, 491, 85 S Ct 476, and this statute does not prohibit picketing so interwined unless engaged in a manner which obstructs or unreasonably interferes with ingress or egress to or from the courthouse. Prohibition of conduct which has this effect does not abridge constitutional

liberty 'since such activity bears no necessary relationship to the freedom to . . . distribute information or opinion." *Schneider* v. *State*, 308 US 147, 161, 84 L Ed 155, 164, 60 S Ct 146. The statute is therefore 'a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and . . . the fact that free speech is intermingled with such conduct does not bring with it constitutional protection.' *Cox* v. *Louisiana, supra,* at 564, 13 L Ed 2d at 492."

It is petitioners' position that even though Ordinances 742-G and 743-G indirectly affect First Amendment rights, as the ordinances regulate the location and manner in which the protected material is disseminated, the ordinances are not overbroad as they are directed to, and regulate only, commercialization of adult sexual material in a manner necessary to protect residential neighborhoods. Nor are the ordinances violative of the equal protection clause, as they provide for classifications of adult "businesses" because only the "adult" businesses have been shown to attract the criminal element, such as prostitutes, etc., and drive away concerned residents and businessmen.

The decision of the Court of Appeals invalidating Ordinances 742-G and 743-G as a denial of equal protection, was based primarily upon *Police Department of Chicago* v. *Moseley*, 408 US 92 (1972). That case invalidated an ordinance which prohibited all picketing within 1000 feet of any school building during classes except "the peaceful picketing of any school involved in a labor dispute." The U. S. Supreme Court could find *no rational basis* for the distinction between "all other peaceful picketing" and "peaceful picketing involving a labor dispute." There was no showing that the ill effects on the schools caused by

"all other peaceful picketing" were different from the ill effects of "peaceful picketing involved in a labor dispute." The case is distinguishable from the case at bar because Petitioners have made a showing that the deleterious effects on a neighborhood are caused, not by all theatres and bookstores, but only those of an "adult" nature. The separate classification and treatment of "adult" theatres and bookstores is necessary not because the contents of the material disseminated in "adult" bookstores and theatres is different, but because of the ill effects on the neighborhood caused by the establishment and operation of those businesses, which effects are not caused by "non-adult" businesses.

As stated by the Honorable Celebrezze in his dissent (page 21):

> "The ordinance goes out of its way not to bar these businesses from a convenient market. Its purpose is, rather, to prevent the breakdown of neighborhoods caused by undue concentrations of these businesses. If non-adult bookstores and theatres contributed to neighborhood blight in the same way that adult businesses do, the City would, no doubt, include them as designated uses under ordinance, just as shoe shine parlors and bars are included. It is not a control on the basis of content in which the City of Detroit is engaging. It is, instead, a justifiable distinction in neighborhood impact that underlies the differential treatment between adult and non-adult businesses. This amply distinguishes our case from *Moseley*, where the City was unable to justify a differential treatment of peaceful labor picketing and peaceful non-labor picketing. The only conceivable reason for the difference in *Moseley* was that the City sought 'to restrict expression

> because of its message, its ideas, its subject matter, or its content'. *Moseley*, 408 US at 95. That is not the purpose of Detroit's ordinance."

The United States Supreme Court has recognized that a classification may be based on the content of the material regulated, if the ill effects caused by the expression of particular ideas in a particular manner, in a particular place, warrant remedial legislation and the regulation is not total prohibition. *Grayned* v. *City of Rockford, supra; Cox* v. *Louisiana, supra; Cox* v. *New Hampshire,* 312 US 569 (1941). The challenged city ordinances regulate the *location* of adult businesses, but do not prohibit them, nor censor the content once the business has been established.

The limited effect of the ordinances on "adult" businesses only was intentional to avoid a claim of overbreadth which would surely be made if the regulations were enacted with respect to all theatres and bookstores. The regulations were purposely limited to "adult" theatres and bookstores because they are the cause of the adverse effects on neighborhoods, which adverse effects provide the compelling state interest required in order to support a regulation of the dissemination of First Amendment material. *Grayned* v. *City of Rockford, supra; Cox* v. *New Hampshire, supra.*

The "solutions" posed by the Court of Appeals are not solutions, as they would be overbroad, and would require families to resort to clusters of adult businesses if they wish to attend a movie at all. As the Honorable Celebrezze stated, "indeed, the . . . suggested solution would accomplish precisely what Detroit seeks to prevent." It is respectfully submitted that the ordinances were narrowly

drawn in the most limited manner possible to accomplish the legitimate governmental purpose sought to be achieved.

In *Cox* v. *Louisiana, supra,* the United States Supreme Court upheld the authority of the city of regulate certain conduct—picketing—but only picketing "with the intent of influencing the administration of justice." Not all picketing was regulated, only that picketing in which the city could demonstrate a compelling state interest. So, in the case at bar, the regulations imposed by the new ordinances are narrowly limited to that class in which the city has shown a compelling state interest.

It is recognized, however, that even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle personal liberties when the end can be more narrowly achieved. *Shelton* v. *Tucker,* 364 US 479, 488, 5 L Ed 2d 231, 237, 81 S Ct 247 (1960). The equal protection clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives. *Williams* v. *Rhodes,* 393 US 23, 21 L Ed 2d 24, 89 S Ct 5 (1968).

The trial court ruled that the portion of Section 66.0103 (Ordinance 742-G; App G, p. A-69), which prohibited the establishment of an adult business within 500 feet of a *single* residential unit was too restrictive to achieve the city's legitimate governmental interest in protecting residential neighborhoods. (A-56, 57) Subsequent to the lower court's ruling, the City of Detroit, effective May 2, 1974, amended Section 66.0103 to prohibit the establishment of adult businesses in certain business and light industrial zoned areas in the city within 500 feet of a residentially zoned district, unless such prohibition is waived by obtaining the consent of 51% of the persons owning, residing or doing business within 500 feet of the proposed

location. The prohibition does not apply to medium or heavy industrial zoned areas. (See Ordinance 891-G, App I, p. A-89).

It is respectfully submitted then, that the definitions in the challenged ordinances are neither value, nor overbroad, nor an improper classification, as they are specific, give fair notice as to what conduct is being regulated, and are limited to those activities which must be regulated in order to preserve and stabilize residential nieghborhoods. It is further submitted that the regulations themselves, as amended effective May 2, 1974, are no more restrictive than are necessary to achieve the city's legitimate governmental purpose.

IV.

ORDINANCES NOS. 742-G AND 743-G OF THE CITY OF DETROIT PROVIDE PROCEDURAL DUE PROCESS WHICH DO NOT OPERATE AS A PRIOR RESTRAINT ON THE EXERCISE OF PLAINTIFF'S RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

It is asserted by the respondents that the regulations imposed by Ordinances 742-G and 743-G, which prohibit the location of adult types of entertainment within 500 feet of a residential unit (as of May 24, 1974 amended to read "within 500 feet of a residentially zoned district" [See Ordinance 891-G, App I, p. 84]), unless waived by the consent of 51% of those within a 500 foot radius, and which prohibit the location of any "regulated use" within 1,000 feet of any two other regulated uses unless such prohibition is waived by the City Plan Commission act as a "prior restraint" upon respondents' exercise of First Amendment rights. Respondents further contend that these regulations are a pre-censorship system which fail to meet

the criteria enunciated in *Freedman* v. *Maryland,* 380 US 51, 13 L Ed 2d 649, 89 S Ct 734 (1965), thereby denying to them the procedural due process required by the Fourteenth Amendment.

"The phrase 'prior restraint' is not a self-wielding sword, nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase must be recognized here." *Kingsley Books* v. *Brown,* 354 US 436, 1 L Ed 2d 1469, 77 S Ct 1325 (1957). In every case cited by the respondents to support their allegation that prior restraint exists here, the term was used either to denote suppression or prohibition of speech protected by the First Amendment, without a judicial determination as to the validity of the prohibition. In the case at bar, "adult" motion pictures, stage performances and press materials are not prohibited. The regulations are addressed to the question "where" adult material should be exhibited; not to the question of when, what or how.

It should also be emphasized that we are considering here not speech in its pure form, either spoken or written, but the regulation of a business which deals in expressive graphic representations which may or may not be accompanied by speech, depicted or described either on the motion picture screen on the stage, or in press materials. It is emphasis on specific sexual *acts* or *anatomical areas* which is the basis of the classification. However, even if the material offered by respondents is classified as "adult", the material itself is never censored or prohibited under Ordinances 742-G or 743-G. An "adult" business, if legally located under the zoning law, and licensed (if required), may disseminate any material without prior restraint. The reasoning of the *Freedman* case is not applicable here as there is no censorship or prior restraint exercised at

any time against the exhibition of any motion picture or stage performance, or dissemination of any press materials under the challenged ordinances.

Respondents' argument that the licensing and zoning regulations on the operation of their businesses indirectly operates as an illegal prior restraint on their First Amendment rights is also untenable. To accept respondents' reasoning, one must ignore all of the following:

1. The City has the right and duty to regulate, by licensing, trades and businesses whose operations affects the public welfare;

2. The City has the right and duty to zone the uses of property in a manner conductive to growth and development of a community and to forestall blight;

3. The City has demonstrated a compelling state interest; i.e., the necessity of regulating the location of certain businesses to a) avoid "clustering" which results in downgrading of business districts and nearby residential neighborhoods; and to b) protect and preserve residential zoning districts by providing a suitable atmosphere for family living and to raise children.

4. That the zoning and licensing regulations are a reasonable exercise of the City's police power directly related to the achievement of a legitimate governmental purpose;

5. That the procedure provided for obtaining a license to operate an adult motion picture theatre as set forth in Ordinance 743-G of the City Code, and Ordinance 742-G of the Official Zoning Code, afford the respondents adequate protection to satisfy the requirements of due pro-

cess of law even though no time limit is specified[6] There is no constitutional requirement that decisions of administrative agencies, such as the licensing bureau or city plan commission, be made within a certain time. However, the requirements of due process will be read into, or implied, in the law when necessary to protect the constitutional rights of the applicant. For example, in *Rydd* v. *State Board of Health*, 451 P 2d 239 (Kansas 1969), the Supreme Court of Kansas ruled that legislation is not rendered constitutionally invalid because of omission of certain procedural safeguards which may be supplied by rule or otherwise by the agency administering the law. The court noted that where no expressed provision for procedural due process is provided in the law, the requirements of reasonable notice and an opportunity to be heard will be implied.

6. Should respondents' constitutional rights to disseminate protected material be arbitrarily denied, or delayed beyond a reasonable length of time in the administrative process, they may seek immediate direct review in the state court of competent jurisdiction, and obtain a Writ of Mandamus or Certiorari in as little time as four days. 1963 Michigan Constitution, Article VI, Secs. 28; 1963 Michigan General Court Rules 710, 711.

> "None of the past decisions have squarely considered wheth parade licenses must be handled on an expedit basis. In *Cox* v. *New Hampshire*, 312 US 569, 85 L Ed 1049, 61 S Ct 762, 133 ALR 1396 (1941), the question was not argued. In *Poulos*

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[6] Ordinance 744-G, relating to the licensing of Group "D" cabarets, (topless, etc.) contained procedural provisions similar to Ordinance 743-G. Ordinance 744-G was upheld by the Michigan Court of Appeals in *Tally* v. *City of Detroit, supra.*

v. *New Hampshire*, 345 U.S. 395, 97 L Ed 1105, 73 S Ct 760, 30 ALR 2d 987 (1953), Poulos' request for a permit to conduct religious services in a public park was refused by the Portsmouth City Council seven and one-half weeks before the first scheduled event. Since the time remaining was sufficient to obtain relief by way of mandamus, see 345 US, at 419-420, 97 L Ed at 1120, 1121, 30 ALR 2d 987 (opinion of Mr. Justice Frankfurter), there was no need to consider whether the State had a constitutional obligation to provide a more rapid procedure. And, of course, those cases which struck down regulatory schemes which purported to issue licenses on the basis of unconstitutional standards did not reach the question presented here. See, e.g., *Lovell* v. *Griffin*, 303 US 444, 82 L Ed 949, 58 S. Ct. 666 (1938); *Schneider* v. *State*, 308 US 147, 163-165, 84 L Ed 155, 165, 166, 60 S Ct 146 (1939); *Largent* v. *Texas*, 318 US 418, 87 L Ed 873, 63 S Ct 667 (1943); *Staub* v. *Baxley*, 355 US 313, 2 L Ed 2d 302, 78 S Ct 277 (1958)." *Shuttlesworth* v. *Birmingham*, at 22 L Ed 2d 74.

As the respondents here are in a position similar to applicants seeking to conduct any business, time is not of the essence, and as they may seek by Writ of Mandamus judicial review of a denial or refusal to act upon their application for a license, they are not denied due process of law. To require that the City, not the respondents, institute proceedings in this situation would be a ridiculous distortion of the ruling enunciated in *Freedman* v. *Maryland, supra.*

7. There is no prior restraint or censorship of any kind exercised over the materials disseminated in an

adult business, after it is legally established under Ordinances 742-G, 743-G or 744-G.

Even assuming, arguendo, that the facts related here in effect impose a prior restraint on the respondents' First Amendment rights, such prior restraint, if any, would not be an invalid regulation of respondents' First Amendment rights. The subject was discussed at length in *Times Film Corp.* v. *Chicago, supra,* where, at page 406, this Court stated:

> "Nor has it been suggested that all previous restraints on speech are invalid. On the contrary, in *Near* v. *Minnesota*, 283 US 697, 715, 716, 75 L Ed 1357, 1367, 51 S. Ct. 625 (1931), Chief Justice Hughes, in discussing the classic legal statements concerning the immunity of the press from censorship, observed that the principle forbidding previous restraint 'is stated too broadly, if every such restraint is deemed to be prohibited. . . . (T)he protection even as to previous restraint is not absolutely unlimited. • • • In addition, the Court said that 'the primary requirements of decency may be enforced against obscene publications' and the 'security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.'" • • •

Thereafter, as we have mentioned, in *Joseph Burstyn, Inc.* v. *Wilson,* 343 US 495, 96 L Ed 1098, 72 S Ct 777, *supra,* we found motion pictures to be within the guarantees of the First and Fourteenth Amendments, but we added that this was 'not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places.'"

"And, during the same Term, in *Kingsley Books, Inc.* v. *Brown*, 354 US 436, 441, 1 L Ed 2d 1469, 1473, 77 S Ct 1325 (1957), after characterizing *Near* v. *Minnesota*, 283 US 697, 75 L Ed 1357, 51 S Ct 625, *supra*, as 'one of the landmark opinions' in its area, we took notice that *Near* 'left no doubts that 'Liberty of speech, and of the press, is also not an absolute right . . . the protection even as to previous restraint is not absolutely unlimited.' . . ."

• • •

"Petitioner would have us hold that the public exhibition of motion pictures must be allowed under any circumstances. The State's sole remedy, it says, is the invocation of criminal process under the Illinois pornography statute, Ill Rev Stat (1959), c 38 § 470, and then only after a transgression."

• • •

"Chicago emphasizes here its duty to protect its people against the dangers of obscenity in the public exhibition of motion pictures. To this argument petitioner's only answer is that regardless of the capacity for, or extent, of such an evil, previous restraint cannot be justified. With this we cannot agree.

We recognized in *Burstyn*, 343 US 495, 96 L ed 1098, 72 S Ct 777, *supra*, that 'capacity for evil . . . may be relevant in determining the permissible scope of community control,' at p. 502, and that motion pictures were not 'necessarily subject to the precise rules governing any other particular method of expression. 'Each method', we said, 'tends to present its own peculiar problems.' At p. 503. Certainly petitioner's broadside attack does ont warrant, nor

could it justify on the record here, our saying that—aside from any consideration of the other 'exceptional cases' mentioned in our decisions—the State is stripped of all constitutional power to prevent, in "the most effective fashion, the utterance of this class of speech. It is not for this Court to limit the State in its selection of the remedy it deems most effective to cope with such a problem, absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances. *Kingsley Books, Inc.* v. *Brown, supra* (354 US at p. 441)."

The City of Detroit has selected the remedy it deems most effective to cope with the clustering of adult types of businesses and their adverse effect on surrounding neighborhoods. The methods chosen are reasonable and are directly related to the achievement of a legitimate governmental purpose. The limited restraint exercised here, if any, is not an invalid prior restraint on the exercise by respondents of their First Amendment rights.

CONCLUSION

The reality of the extensive problems faced by cities in their attempt to stimulate growth and development while at the same time fighting blight and decay in the neighborhoods has been faced by the City of Detroit. Adoption of "regulated uses" has been determined by the City as the most appropriate method of achieving well-planned urban development. Experience in various sections in New York City and in the City of Detroit, where adult types of entertainment have clustered together in business districts which are immediately adjacent to residential communities, resulting in a downgrading of the neighborhood has dictated that adult types of entertainment be classified as "regulated uses." To ignore this fact is to blindly ignore what is happening in our cities today, and fail in the city's duty to provide rational, intelligent, protective city planning. The law should not be powerless to exert its force in situations where, under the guise of First Amendment rights, indulgence is sought in acts which are primarily profit making and only incidentally an expression of First Amendment rights, and which clearly and unmistakably adversely affect the rights of citizens who are unable to protect themselves.

The new provisions of Ordinances 742-G (as now amended by Ordinance 891-G) and 743-G of the City of Detroit were enacted in response to a compelling, substantial interest of the City in the welfare of its citizens; it is a reasonable proper exercise of the City's police powers, and the regulations are directly related to the achievement of a legitimate governmental purpose. Petitioners respectfully submit that they are, therefore, constitutional and should be upheld.

RELIEF

WHEREFORE, Petitioners respectfully pray that this Honorable Court declare the provisions of Ordinances 742-G (as now amended by Ordinance 891-G), and 743-G to be constitutionally valid; reverse the decision of the Court of Appeals, and affirm the decision of the trial court.

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